

DOCKET FILE COPY ORIGINAL

RECEIVED

Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 13 1997

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Advanced Television Systems)
and Their Impact upon the) MM Docket No. 87-268
Existing Television Broadcast Service)

To: The Commission

Petition for Reconsideration

Broadcasting for the Challenged, Inc., by its attorney and pursuant to Section 1.429 of the Commission's Rules and Regulations, hereby respectfully submits a Petition for Reconsideration with respect to MM Docket 87-268. In support thereof, the following is shown:

A. Background

1. Broadcasting for the Challenged, Inc. currently has pending FCC Form 340 applications seeking authority to construct the following new TV stations:

<u>Community of License</u>	<u>Channel</u>	<u>FCC File Number (or Filing Date)</u>
Hot Springs, AR	20	BPET-961001KG
Tulsa, OK	63	BPET-961001KH
Senatobia, MS	34	BPET-961001KI
Phoenix, AZ	39	BPET-961001KF
Memphis, TN	56	BPET-961118KJ
Nogales, AZ	16	BPET-961119KH
Ogden, UT	18	BPET-961119KK
Salt Lake City, UT	26	BPET-970331__

No. of Copies rec'd 0214
List A B C D E

2. On April 3, 1997, the Federal Communications Commission ("FCC") adopted its Fifth Report and Order and Sixth Report and Order in MM Docket 87-268.¹ Given the common issues and substance of both Report and Orders, they shall be collectively referred to herein as the "R & O". Generally speaking, the R & O sought to address a wide variety of issues surrounding digital television, e.g., eligibility, spectrum use, procedural matters, allocations/allotment preferences, etc. The following represents the specific portion of the R & O which directly and adversely affects the rights of Broadcasting for the Challenged, Inc. as a Commission applicant and where reconsideration is appropriate.²

B. The Commission's DTV Allotment System Has Arbitrarily Denied Current Applicants for Television Allotments the Right to Receive DTV Licenses

3. Succinctly stated, the R & O, through curious procedural gymnastics, has stripped Broadcasting for the Challenged, Inc. and other similarly-situated applicants of a fundamental right without due process. There are currently hundreds, if not thousands, of applicants before the FCC seeking authority to construct new television stations on various channels across the country. The FCC has, in paragraph 69 of Fifth

¹ The release date for the subject R & O's was April 21, 1997.

² It should be noted that George S. Flinn, Jr. (a Voting Board Member of Broadcasting for the Challenged, Inc.) is the President and sole voting shareholder of Flinn Broadcasting Corporation and a voting shareholder of Longmont Channel 25, Inc. Both Flinn Broadcasting Corporation and Longmont Channel 25, Inc. have contemporaneously herewith filed Petitions for Reconsideration which address other elements of the R & O.

Report and Order, fashioned a curious interpretation of the intent of Congress as promulgated in the 1996 Telecommunications Act. By engaging in an invidious procedural sleight-of-hand, the Commission has revised its normal licensing procedures to specifically exclude a whole class of individuals (i.e., pending applicants) for no other reason than it is administratively expedient. In fact, in a somewhat bold admission, the Commission noted (incorrectly) in the R & O that "[u]se of the conventional licensing process would prevent us from establishing a date certain at which to determine initial eligibility, a process that is necessary to allow us to establish the Table of Allotments".

4. Putting aside the question of whether the Commission is authorized to so radically alter its licensing procedures without issuing an appropriate NPRM, a brief reflection on recent FCC actions in this DTV proceeding will highlight why the baseless discrimination against pending applicants is so troubling. In issuing its Sixth Further Notice of Proposed Rulemaking on July 25, 1996, the FCC specifically indicated that it intended to "freeze" the filing of applications for new NTSC stations or petitions for rulemaking proposing to amend the existing TV Table of Allotments (i.e., effective within 30 days of the release of the Sixth Further Notice of Proposed Rulemaking). Clearly, the express and implied purpose of doing so was to allow the establishment of a date certain "at which to determine initial [DTV] eligibility, a process that is necessary to allow us to establish the Table of Allotments" (note: This quote taken from most recent R & O as a basis for denying pending applicants any present rights to DTV licenses).

5. By way of simplistic summary, the FCC in the last year has:

(A) Indicated that it intended to institute a "freeze" on the acceptance of new applications for stations and the acceptance rulemaking petitions for amendment to the existing TV Table of Allotments as of a date 11 months prior to the issuance of the most recent R & O.

(B) Accepted hundreds, if not thousands, of applications and millions of dollars in FCC filing fees alone knowing that it intended to issue essentially worthless construction permits (i.e., since under the R &O there is no guarantee of a DTV allotment and NTSC licenses must be turned in to the Commission after the transition to the digital standard).

6. It truly is as simple as that. What possible rationale could the FCC have for arbitrarily deciding that an existing construction permit holder should have a vested right in a DTV license while a pending applicant should not? Even assuming that the Commission's argument regarding the need for administrative "certainty" in setting the DTV allotments is valid (i.e., that they could not have alternatively proposed, for example, to simply protect the maximum facilities of a proposed station), isn't that precisely what they were seeking to accomplish by establishing the "freeze" on new applications and rulemakings?

7. Where in the R & O is the objective, factual evidence in support of the blatant discrimination against pending applicants? There is absolutely none. The arbitrary exclusion of pending applicants from DTV consideration is not only legally indefensible but also wholly unfair. The applicants in question have individually expended large

sums of money in FCC filing fees, engineering fees, legal fees, site and zoning fees, etc. and devoted incalculable hours to the preparation and processing of their respective applications based upon the belief that they were pursuing construction permits for stations whose licenses would not expire as a matter of law within a set number of years.³

C. Conclusion

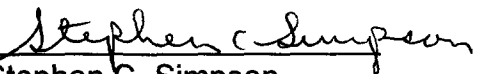
The Commission has arbitrarily, and without any factual justification whatsoever, proposed to exclude a specific class of individuals (i.e., pending applicants for existing television allotments) from receiving DTV licenses. This blatant violation of the Equal Protection Clause and the Due Process Clause of the United States Constitution should be summarily reversed and the rights of pending applicants (i.e., the prevailing applicant) to ultimately receive a DTV license consistent with paired NTSC allotment be restored.

³ Given the Commission's position in the most recent R & O, there clearly has been no incentive for the Commission's staff to act with any degree of alacrity in processing pending applications.

Wherefore, based on the foregoing, it is respectfully requested that Broadcasting for the Challenged, Inc.'s subject Petition for Reconsideration be granted and that the changes proposed therein be adopted.

Respectfully submitted,

Broadcasting for the Challenged, Inc.

By: 
Stephen C. Simpson
Its Attorney

1090 Vermont Avenue, N.W.
Suite 800
Washington, D.C. 20005
(202) 408-7035